Supreme Court, U.S.
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No. 97-235

In the

Supreme Court of the United States

October Term, 1997

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Petitioner,

vs.

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in her official capacity as Cass County Auditor; MARGE L. DANIELS, in her official capacity as Cass County Treasurer; STEVE KUHA, in his official capacity as Cass County Assessor; JAMES DEMGEN, in his official capacity as Cass County Commissioner; JOHN STRANNE, in his official capacity as Cass County Commissioner; GLEN WITHAM, in his official capacity as Cass County Commissioner; ERWIN OSTLUND, in his official capacity as Cass County Commissioner; VIRGIL FOSTER, in his official capacity as Cass County Commissioner,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CONDITIONAL CROSS PETITION

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QUESTION PRESENTED

1. Whether the inherent tax immunity of tribal governments was extinguished with unmistakable clarity by provisions in the General Allotment Act of 1887 permitting land to be patented in fee to individual Indians?

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25 U.S.C. § 177 (1996)

The Leech Lake Band of Chippewa Indians ("the Band") respectfully requests the Court to grant this Conditional Cross Petition for Writ of Certiorari, but only in the event that the Court grants the Petition for Writ of Certiorari of Cass County, Minnesota ("the County") in this matter.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 108 F.3d 820, and is printed in the County's Petition for Writ of Certiorari at App. 1-29. The opinion of the District Court for the District of Minnesota is reported at 908 F. Supp. 689 and is printed in the County's Petition at App. 30-49.

JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on March 6, 1997, and entered its Order denying the County's petition for rehearing and suggestion for rehearing *en banc* on April 9, 1997.

This Conditional Cross Petition for Writ of Certiorari is filed pursuant to Rule 12.5 of the Rules of the Supreme Court of the United States. The County's Petition, to which this Conditional Cross Petition relates, was docketed July 8, 1997. The Band received copies of the County's Petition for Writ of Certiorari July 9, 1997.

The jurisdiction of this Court is conferred by 28 U.S.C. section 1254(1) (1996).

STATUTORY PROVISIONS INVOLVED

The relevant statutes were named in the County's Petition and the Respondent's Brief in Opposition. Those statutes include the Nelson Act of 1889 (25 Stat. 642); the General

Allotment Act of 1887 (24 Stat. 388); the Burke Act of 1906 (34 Stat. 182); the Homestead Act of May 20, 1862 (12 Stat. 392), as amended by the Act of March 3, 1891 (26 Stat. 1095); and the Nonintercourse Act (25 U.S.C. § 177 (1996)).

STATEMENT OF THE CASE

This Conditional Cross Petition adopts the Court of Appeals description of this case as it appears in 108 F.3d at 821-824, and at App. 2-8 of the County's Petition; and accepts as generally accurate the Statement of the County at page 2-6 of its Petition.

REASONS FOR GRANTING THE CONDITIONAL CROSS PETITION

The Band has filed a Brief in Opposition to the granting of the County's Petition for Writ of Certiorari in this case. The Band is willing to accept the decision of the Court of Appeals in this case without further appeal, and has asserted that there is insufficient reason for this Court to grant review.

However, if the Court determines to hear this case, the Band submits this Conditional Cross Petition in order to argue to the Court that the Court of Appeals should have granted the full relief requested by the Band in this lawsuit--an order declaring that all lands owned in fee by the Band within its reservation, whatever the title origin and whenever acquired, are immune from county taxation. Such an order is justified based on the existence of the long-standing doctrine of governmental sovereign immunity from taxation, and on the absence of any congressional legislation specifically granting states and local governments the right to tax other sovereign governmental entities such as tribes (as opposed to the right to tax individual tribal members).

1. The Court Of Appeals Ignored The Long-Recognized Inherent Tax Immunity Of Tribal Governments.

The Court of Appeals refused to recognize that tribal governments stand on a different footing than do individual Indians with regard to the Indian allotment process and congressional approval of state and local taxation. Tribal governments have a long-standing sovereign immunity from taxation or suit by state and local governments, an immunity that is similar to that enjoyed by the United States government itself. *See, e.g.,* Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). When tribal governments purchase land, that immunity protects the government and the land from the imposition of taxes by other sovereigns such as the state and county. Just as land newly purchased by the United States becomes immune from local taxation upon purchase, regardless of the origin of title to such land (*see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)), land purchased by tribal governments similarly should become immune upon purchase. No legal rule or statute says that if land is taxable to one owner, it must remain taxable to all subsequent owners (including governments).

The tax immunity of tribal governments is grounded on the long-recognized fact that the "various Indian tribes were once independent and sovereign nations, and that their sovereignty long predates that of our own government." McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973). The governmental sovereignty enjoyed by tribes is a legal reality that this Court has acknowledged time and time again. *See, e.g.,* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982)(tribal power to tax is a fundamental aspect of sovereignty which tribes retain); United States v.

Wheeler, 435 U.S. 313, 322 (1978)(tribes possess the inherent powers of a limited sovereignty which has never been extinguished); United States v. Mazurie, 419 U.S. 544, 557 (1975)(tribes retain attributes of sovereignty over their members and their territory).

The inherent immunity of tribal governments, derived from their status as unique sovereigns, can only be removed by Congress in the most explicit terms. *See, e.g.*, Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, ___, 115 S.Ct. 2214, 2220 (1995); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 181 (1989); Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985). The question in this case is what congressional statute authorized taxation of tribal government land.

The Court of Appeals interpreted the holding in County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992) as requiring a conclusion that the General Allotment Act of 1887 (as amended by the Burke Act of 1906) authorized taxation not only of individual Indian land but also of tribal government land, despite the fact that nothing in either of those acts even remotely refers to tribal governments or land that might be owned by such governments. The Band believes that the issues of tribal sovereignty generally, and inherent sovereign immunity from taxation specifically, were never fully briefed or argued to this Court (or any of the courts below) in the Yakima case. The separate governmental immunity of Indian governments provides a special barrier to taxation, a barrier that does not protect individual Indians and lands patented to them in fee under the General Allotment and Burke Acts.

In effect, the Court of Appeals held that once private Indian land becomes taxable, it must always remain taxable, even after it is acquired by an otherwise tax immune tribal government. This "once taxable, always taxable" logic ignores the well-established rule that Indian tribes are immune

from state and local taxation unless Congress consents to such taxation in unmistakably clear terms. Instead, such logic creates a presumption that, for fee-patented individual land, a tribal government is taxable impliedly unless Congress grants an express exemption. Such a presumption is not warranted under federal statute or precedent.

Since the Burke Act and the General Allotment Act did not clearly authorize the taxation of tribal government land, as opposed to individual Indian land, such government land must still be immune from taxation. The failure of the Court of Appeals to recognize this was error, and such error will be asserted by the Band to this Court if the Petition for Writ of Certiorari and this Cross Petition are granted. The Band will argue that its governmental immunity makes all of its on-reservation government-owned fee land (not just its land originally patented as pinelands and homesteads under the Nelson Act of 1889) immune from state and local property taxation.

CONCLUSION

The Band has submitted a Brief in Opposition to the County's Petition for Writ of Certiorari in this case, asserting that review is not necessary or proper herein. However, if the County's Petition for a Writ of Certiorari is granted, the Band requests the Court to accept this Conditional Cross Petition as well, since the Band will argue for and can justify greater relief than was granted by the Court of Appeals below.

Dated: August 8, 1997 Respectfully submitted,

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